

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JONATHAN CARTER,

Plaintiff,

v.

FAMILY AND CHILD TREATMENT OF  
SOUTHERN NEVADA,

Defendant.

Case No. 2:04-cv-0409-KJD-RJJ

**ORDER**

Currently before the Court is Defendant's Counter-Motion to Dismiss for Failure to Prosecute (#72), filed January 13, 2009. Plaintiff filed a Response (#75) on January 25, 2009. On January 30, 2009, Defendant filed a Reply (#76). On February 6, 2009, Magistrate Judge George Foley, Jr., issued his Findings and Recommendations (#79), recommending that the Court deny the Motion to Dismiss for Failure to Prosecute. Pursuant to LR IB 3-2, a party wishing to object to the findings and recommendations of a magistrate judge must file and serve specific written objections together with points and authorities in support thereof, within ten days of the date of service of the findings and recommendations. To date, Defendant has failed to file any points and authorities in objection to the Magistrate Judge's Findings and Recommendations.

The Court has reviewed the Magistrate Judge's Findings and Recommendations, together with the Motion, Response, and Reply, and accepts the Magistrate Judge's Recommendation to deny Defendant's Motion to Dismiss for Failure to Prosecute.

**I. Procedural History**

Plaintiff filed a Complaint on November 18, 2003, with the District Court of Clark County, against Defendant Family and Child Treatment of Southern Nevada ("FACT"), among others,

1 alleging the violation of his civil rights, negligence, negligent supervision, intentional infliction of  
2 emotional distress, and abuse of process. The case was removed to this Court on April 5, 2004. On  
3 September 22, 2005, all claims against all Defendants were dismissed. Plaintiff filed a Notice of  
4 Appeal (#55) on October 19, 2005. On November 29, 2007, the Ninth Circuit issued an order  
5 reversing the court's dismissal of the claims against FACT.<sup>1</sup> (See #51.) On December 6, 2007, the  
6 Court filed an Order on Mandate (#67). On January 8, 2009, after more than a year of inactivity,  
7 Plaintiff filed a Motion to Re-Open Discovery (#68), which the Court granted on February 5, 2009.  
8 Defendant then filed the present Counter-Motion to Dismiss for failure to prosecute.

## 9 **II. Analysis**

10 Pursuant to Local Rule 41-1, the Court may dismiss a case that has gone nine months without  
11 any proceeding of record having been taken. Dismissal for failure to prosecute, however, "is so  
12 harsh a penalty, it should be imposed only in extreme circumstances." Raiford v. Pounds, 640 F.2d  
13 944, 945 (9th Cir. 1981). In order to dismiss for want of prosecution, there must also be an  
14 unreasonable delay in prosecution, which delay "creates a presumption of injury to the defense."  
15 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986). When considering whether to dismiss a  
16 case due to failure to prosecute, a court must weigh five factors: "(1) the public's interest in  
17 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice  
18 to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the  
19 availability of less drastic sanctions." Id. (citations omitted).

20 The Court has made a *de novo* determination regarding the Defendant's Motion to Dismiss  
21 for Failure to Prosecute, and adopts the Magistrate Judge's findings in whole. Specifically, the Court  
22 has considered the public's interest in the expeditious resolution of litigation and is not persuaded  
23 that it weighs substantially in favor of dismissal. In addition, the Court finds that no unreasonable  
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25 <sup>1</sup>Plaintiff appealed the dismissal of the claims against both Clark County and FACT. The Court of Appeals  
26 upheld the dismissal of the claims against Clark County but reversed and remanded the dismissal of the claims against  
FACT. Thus, FACT remains the only Defendant in the case.

1 burden is inflicted on its docket by denying dismissal. Moreover, although Defendant avers that the  
2 fading memories of its witnesses create an unfair prejudice on Defendant's ability to proceed should  
3 the dismissal be denied, "aggravation of anxiety and the continued 'fading' of witnesses' memories"  
4 alone are not sufficiently harmful to the defense to force dismissal for want of prosecution. Raiford,  
5 640 F.2d at 945. Additionally, the public policy of deciding cases on their merits and the availability  
6 of less drastic measures do not weigh in favor of dismissal. As pointed out in the Magistrate Judge's  
7 Findings and Recommendations, this case differs from Henderson because the court in that case  
8 granted dismissal only after issuing several warnings that dismissal was impending if the plaintiff  
9 failed to file a pretrial order. Thus, in Henderson, several less drastic actions were taken before  
10 dismissal was appropriate, whereas, here, Plaintiff has not failed to comply with any orders or  
11 warnings that dismissal was proximate.

12 Additionally, the Magistrate Judge properly found that the delay in prosecution here is  
13 understandable because the Court normally re-opens the case upon the entry of remand, yet did not  
14 do so in this case. As Defendant has not specified any substantial hardship caused by the delay, and  
15 as Plaintiff has not acted contrary to any explicit order, the Court finds that dismissal for failure to  
16 prosecute is not appropriate in this case.

17 Accordingly, **IT IS HEREBY ORDERED** that the Magistrate Judge's Findings and  
18 Recommendations (#79) is accepted and adopted in whole.

19 **IT IS FURTHER ORDERED** that Defendant's Motion to Dismiss (#72) is **DENIED**.

20 Dated this 21 day of May 2009.

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22 Kent J. Dawson  
23 United States District Judge  
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